The European Court of Human Rights and FIFA: Current Issues and Potential Challenges

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Introduction

The aim of the present post is to address the relevance of the European Court of Human Rights (ECtHR) and the legal basis for its work, the European Convention on Human Rights (ECHR), for FIFA. In part I, it will be shown that there is room for the ECHR and the ECtHR to become relevant for the work and activities of FIFA. In part II, two examples of cases will be discussed which are capable of influencing the future regulatory behaviour and politics of FIFA in certain areas, namely the cases of *Mutu v. Switzerland* and *Šimuni# v. Croatia*. The guarantees at stake in those cases were the right to a fair hearing (Art. 6 ECHR) and the freedom of expression (Art. 10 ECHR), respectively.

I The potential significance of the ECHR and the ECtHR for FIFA

FIFA is a private actor, namely an association under Swiss law (Art. 60 *et seq*. of the Civil Code), but in principle only states are accountable under the ECHR for human rights violations (Art. 1 ECHR). From my point of view, the ECHR and the ECtHR have nevertheless a potential role to play for FIFA, and this under different angles.

First of all, FIFA is likely to take into account the case law of the ECtHR in its activities. In fact, Art. 3 of the FIFA Statutes provides that:

> “FIFA is committed to respecting all internationally recognized human rights and shall strive to promote the protection of these rights.”

The ECtHR is often considered as one of, or even the most effective international human rights court, in particular due to its dynamic interpretation (also referred to by the Court as interpretation “in the light of present-day conditions”; see already *Tyrer v. the United Kingdom*, No. 5856/72, 25 April 1978, § 31), which has allowed the Court to constantly update its jurisprudence and adapt it to current social developments and needs. As a result, if Art. 3 shall not remain a pure lip-service to human rights but become one of the core principles of the organization, in the sense of a real human rights commitment, FIFA cannot ignore the case law of the ECtHR in domains that are of relevance to its work.

According to the Ruggie Report ("For the Game. For the World." FIFA and Human Rights), the following areas, in particular, necessitate FIFA's close attention: land acquisition, construction and procurement supply chains, as well as player transfers. Those are domains in which the ECtHR's expertise and experience could play a role in the future. Relevant guarantees are, *inter alia,* the right to property (Art. 1 of Protocol No. 1 to the ECHR), as well as the prohibition of slavery and forced labor (Art. 4 ECHR; see also *Chowdury and Others v. Greece,* No. 21884/15*,* 30 March 2017), of which the principles would be applicable *mutatis mutandis* to situations of stadium constructions or in the procurement supply chain.

Moreover, in certain football-related situations, there is an interference in human rights by State authorities and, as a result, such allegations of human rights violations can be brought before national courts, and provided the state concerned is a member state of the Council of Europe, the ECtHR will have jurisdiction to deal with such cases (See *S., V. and A. v. Denmark*, No. 35553/12 et al., 22 October 2018, and *National Federations of Sportspersons' Associations and Unions (FNASS) and Others v. France*, No. 48151/11 et al., 18 January 2018). In other cases, however, if the acts (or omissions) of which one complains are considered "private" acts, for instance taken by a football club or a national football association and/or FIFA, they might be submitted to a dispute settlement mechanism within a national football association or FIFA. Their decisions might open the way to the Court of Arbitration for Sport (CAS), followed by a potential appeal at the Swiss Federal Tribunal by virtue of Art. 190 *et seq*. of the Swiss Federal Act on Private International Law. The latter's jurisdiction is nevertheless very limited, namely to the question whether the sentence is in breach of the *ordre public* (Art. 190 § 2 (e)) This concept allows the Swiss Federal Tribunal to take into account human rights considerations, even though not every human rights violation constitutes necessarily a breach of the *ordre public.*

Such procedures before the CAS, followed by the potential intervention of the Swiss Federal Tribunal are ubiquitous in international sports, for which *Mutu v. Switzerland* constitutes a typical example (see below).

However, if a State party neither offers an effective remedy before state courts nor imposes a "private" dispute settlement mechanism, there might *per se* be a problem regarding access to a court and fair hearing (Art. 6 § 1 ECHR), as well as effective remedy (Art. 13 ECHR). Apart from those procedural shortcomings, a state might also be in breach of a "positive" obligation to put into place a protective legal framework enabling the individual to complain about a certain "private" conduct, for instance, by FIFA or national football federations. Such positive duties derive from the practice of the ECtHR and concern most of the provisions of the ECHR (See *e.g.* concerning the prohibition of forced labour and slavery *Rantsev v. Cyprus and Russia*, No. 25965/04, 7 January 2010, §§ 301-309).

Yet another problem, even more complicated, is the question whether a State party to the ECHR can be held liable for acts attributable to FIFA occurring outside of the territory of the 47 member states of the Council of Europe and whether, in such a situation, the ECtHR would have jurisdiction. One can think of migrant workers being exploited on a construction site of a new football stadium for an upcoming

competition, for example in Qatar in preparation of the Football World Cup 2022. From the outset, states have, under the ECHR, only exceptionally been held liable for acts or omissions performed or producing effects outside their territories (*e.g. Al-Skeini and Others v. the United Kingdom*, No. 55721/07, 7 July 2011, §§ 131 *et seq*., or *Issa and Others v. Turkey*, 31821/96, 16 November 2004, §§ 68 and 71). This can occur where a state exercises effective control over a given area, or where it exercises authority and physical control over individuals outside its own territory (See, for both categories, the case law summarized in *Al-Skeini*, cited above, §§ 133-140). Regarding FIFA, due to their theoretical similarities, a comparison with the liability of businesses abroad is relevant. In fact, the ECtHR has not yet held states liable for failure to exercise control over a business' conduct abroad (see Polakiewicz, 2012, 31). The same is true for the control over FIFA's activities outside of Switzerland, but it is not *a priori* excluded that states, in particular Switzerland as the host state of FIFA, will be held liable for such a failure in the future. After all, human rights regimes are extremely dynamic in nature.

II Recent ECtHR cases showcasing the relevance of the ECHR for FIFA

In this part, I will present two examples of areas in which the activities of FIFA are already influenced by the jurisprudence of the ECtHR: the right to a fair hearing (Art. 6 ECHR) and the freedom of expression (Art. 10 ECHR).

The Mutu case and FIFA justice

The case of *Mutu v. Switzerland* concerned the lawfulness of proceedings brought by professional football player before the CAS after having exhausted dispute settlement procedures within the English Premier League and the Dispute Resolution Chamber of FIFA (*Mutu*, §§ 12, 14). Adrian Mutu alleged that the immediate suspension of his contract by Chelsea FC for breach of contract due to a positive cocaine test was unlawful. In a series of awards (see here) the CAS rejected Mutu's arguments and recognised the validity of his dismissal by Chelsea FC, further it also found that it owed a considerable sum of money to the English club due to his unlawful breach of contract. After failing to convince the Swiss Federal Tribunal to overturn the award, he submitted an application to the ECtHR arguing that the CAS could not be regarded as an independent and impartial tribunal. The Court held that there had been no violation of Art. 6 § 1 (right to a fair trial) of the Convention with regard to the alleged lack of independence of the CAS. It found that the CAS arbitration proceedings to which the applicant had been party offered all the safeguards of a fair hearing, and that the applicant's criticisms concerning the impartiality of certain arbitrators, had to be rejected.

How is the ECtHR's judgment in the *Mutu case* capable of influencing FIFA's future behaviour or politics in concrete terms? FIFA had an obvious interest in the case decided by the ECtHR since the latter endorsed the independence of the CAS which plays a key role as an appeal body for the decision of FIFA's judicial bodies. Probably the most important outcome of the case is, however, the finding of the

ECtHR that the dispute opposing a player to his club are of a “civil nature” and that, as a result, the guarantees of a fair hearing are applicable to such a case. In other words, FIFA and other relevant actors must be aware that the ECtHR has jurisdiction to supervise FIFA’s judicial system and its compliance with the due process rights of players (and others; see also the pending case of *Ali Riza v. Switerland*, No. 74989/11.).

Šimuni# and the freedom of expression of football players

Another relevant issue where the ECtHR had to decide a case relevant to FIFA regards its commitment against discrimination. In football, there are recurrent instances of homophobic and other types of discriminatory chants in stadiums, which FIFA attempts to deter through regulation and disciplinary sanctions (Ruggie, 24-25). In the case of *Šimuni# v. Croatia*, the applicant, a football player, was convicted by the Croatian authorities of a minor criminal offence for addressing messages to spectators of a football match, the content of which expressed or enticed hatred on the basis of race, nationality and faith. In fact, he used an official greeting of the Ustash[e] movement and totalitarian regime of the Independent State of Croatia. Before the Court, he submitted in particular that his right to freedom of expression (Art. 10 ECHR) had been violated. The Court declared the applicant’s complaint inadmissible as being manifestly ill-founded, finding that the interference with his right to freedom of expression had been supported by relevant and sufficient reasons and that the Croatian authorities had struck a fair balance between his interest in free speech, on the one hand, and society’s interests in promoting tolerance and mutual respect at sports events as well as combating discrimination through sport on the other hand. The Court noted in particular that the applicant, being a famous football player and a role-model for many football fans, should have been aware of the possible negative impact of provocative chanting on spectators’ behaviour, and should have abstained from such conduct.

FIFA has for a certain time now statutory and regulatory prohibitions against racism and discrimination (See, in particular, Art. 4 of the FIFA Statutes). Already before the case of *Šimuni#*, FIFA had repeatedly imposed fines on the Croatian Football Association and banned fans for similar expressions, during football matches (See, *inter alia*, the incidents mentioned in Josip *Šimuni# v. FIFA*, CAS award of 29 July 2014, CAS 2014/A/3562, §§ 71, 87). Its determination to combat racism and discrimination is also expressed in the Memorandum of Understanding concluded with the Council of Europe on 5 October 2018 (See 1.1 of the Memorandum). The ECtHR’s decision in the case of *Šimuni#*reinforces FIFA’s commitment against discrimination and confirms that the sanctions it is imposing onto clubs and players for discriminatory conducts are likely to be deemed compliant with the ECHR. It does not, however, give *carte blanche* to the states and FIFA because the ECtHR made clear that measures against racism and discrimination have to take into account other fundamental interests, in particular the right to freedom of speech. It imposes on the States parties to the ECHR to verify whether the impugned measure has a legal basis and to make a balancing test, which only meets the ECHR requirements if the sanction pursues a legitimate aim and is necessary in a democratic society,

within the meaning of § 2 of Art. 10. This test is, thus, transposable *mutatis mutandis* to FIFA's anti-discrimination measures and sanctions.

As a result, the *Šimuni#* case provides for useful guidance as regards the limits imposed on FIFA in the fight against racism and discrimination. In addition to the right to a fair hearing and freedom of expression, the ECtHR can potentially play a role in other areas, including through the interpretation of Art. 3 of FIFA's Statutes. Finally, the future will show whether the ECtHR will assume extra-territorial jurisdiction to hear an allegation of the failure by a State to control the conduct of FIFA abroad.
